IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

No. 28, Original

IN THE MATTER OF THE APPLICATION OF SKINNER & EDDY CORPORATION, PETITIONER, FOR A WRIT OF MANDAMUS OR PROHIBITION TO THE HONORABLE THE UNITED STATES COURT OF CLAIMS

BRIEF ON BEHALF OF PETITIONER

STATEMENT OF CASE

This is a petition for the issuance of a writ of mandamus, or, in the alternative, a writ of prohibition, directed to the Court of Claims, prohibiting that court from further proceeding in the case of the Skinner & Eddy Corporation vs. The United States. That suit was filed in the Court of Claims on the 15th of June, 1921, and on April 30, 1923, was dismissed by order of that court on petitioner's motion, made April 11, 1923.

The complete complaint filed in the Court of Claims is found in Volume I of Exhibit "D."

On November 28, 1923, approximately seven months after the order of dismissal was made, the Court of Claims set aside the order, restored the case, and granted the United States permission to file a counter-claim. After the counter-claim was filed, the petitioner made a motion in this court for permission to file a petition for a writ of mandamus requiring the Court of Claims to restore the original order of dismissal or for a writ of prohibition prohibiting further proceedings in said case. The motion for permission to file the petition was granted, and the hearing now is upon the petition and preliminary rule issued by this court.

The complete proceedings and record in the Court of Claims on the petitioner's motion to dismiss and on the Government's motion to set aside the order of dismissal and for permission to file a counter-claim are found in Record Volume II.

STATEMENT OF FACTS

In order to present clearly to the court the issues involved, it will be necessary to recite, as briefly as may be, a statement of the facts which led up to the filing of the suit in the Court of Claims, and subsequently to the filing of the petition in this court.

In 1917, The Skinner and Eddy Corporation, the petitioner in this proceeding, was the owner of a shipbuilding plant in the City of Seattle, and there engaged in building steel ships as a commercial enterprise. During the years 1917 and 1918, five contracts were made between the Skinner and Eddy Corporation and the United States Shipping Board Emergency Fleet Corporation for the construction of steel

ships. (By typographical error on page 270, Volume I, record, contract 324 appears to bear date June 1, 1919, when in fact, the correct date is June 1, 1918, as shown by the petition on page 6, Volume I.) These were not the well known cost-plus contracts, but were contracts for the construction of certain definite ships according to certain definite plans and specifications, for certain definite lump sum prices. Besides these there were other contracts supplementary to and modifying the five just mentioned, and in addition, there was a contract in the form of a letter, dated May 11, 1918, which in many respects is the most important contract of all.

This letter is set out at page 236, Volume 1, and provides that the Fleet Corporation shall lease and sell to Skinner and Eddy a certain shipbuilding plant at Seattle, the purchase price being the exact amount the Fleet Corporation had paid for the yard. The letter further provides that the Fleet Corporation will award to Skinner and Eddy two contracts for building steel ships—one for 35 ships, and one for 15 ships. The contract price for these ships is specified, and in the aggregate reaches some $90,000,000. It is further provided that the thirty-five ships contracted for shall be constructed by the Skinner & Eddy Corporation in the shipyard to be purchased by it from the Fleet Corporation.

This letter also provides that Skinner and Eddy shall pay a rental for the yard of $125,000 per ship for each of the first thirty of these ships delivered under this contract, that these installments of $125,000 each shall be credited on the purchase price and when thirty installments aggregating $3,750,000 have been paid, the balance of the purchase price, something less than $500,000, shall be paid in one lump.

In pursuance of the terms of this letter, the two formal contracts for the construction of the thirty-five ships and the fifteen ships were entered into, and a formal lease of the yard was made to the Skinner and Eddy Corporation. This lease provided that in addition to making the payments called rent, but really installments of the purchase price, Skinner and Eddy Corporation should expend not less than $1,000,000 in improving and rebuilding the plant. (Pages 464-5, Vol. I.) As Skinner and Eddy Corporation had a contract to buy this yard, they would of course receive the benefit of the $1,000,000 to be expended in improving the yard.

In addition to these fifty ships, there were other contracts as before mentioned, making contracts for an aggregate of eighty-two steel vessels for an aggregate contract price approaching $150,000,000. Of these vessels, fifty-seven were actually constructed and delivered, and twenty-five were canceled by the orders of the Director-General, appearing in record Vol. I, pages 579-580. Controversies arose between the Fleet Corporation and Skinner and Eddy Corporation over these various transactions, and on the 15th of June, 1921, Skinner and Eddy Corporation began an action against the United States in the Court of Claims.

There were numerous items claimed in the complaint filed aggregating $24,167,389.55. Credit was given against this amount of $6,673,900 for money paid under the cancelled contracts, and materials and supplies furnished. The net judgment asked was $17,493,488.97.

Amongst the items claimed was one of $17,303,000 for anticipated profits on the twenty-five canceled ships. Some of the other items for which judgment

was asked included one for practically $1,000,000 alleged to be due and unpaid on the purchase price of ships completed and delivered. There were a variety of other items unnecessary to mention; but it is necessary to call particular attention to items of a different character than those involving a direct promise to pay money. These items are items which grew out of the cancellation of the contract for twenty-five ships. The most important of these items are as follows:

It is alleged that in order to get ready to construct these twenty-five ships, Skinner and Eddy Corporation purchased a large amount of material at a cost of over $2,000,000 and that when the ships were canceled, the Fleet Corporation took over and removed from petitioner's yard over $540,000 worth of this material that petitioner had paid for, and petitioner was compelled to sell the remainder of this material at a large loss, making a total loss on material purchased for the canceled ships of over $900,000.

It is further alleged that under its contract to purchase the shipyard from the Fleet Corporation it had paid some $500,000 on account of the purchase price, and had expended in betterments and improvements and in rebuilding this yard over $1,200,000; that the cancellation of the ships deprived the petitioner of paying for this shipyard in the only way it had agreed to pay for it; and that thereafter the Fleet Corporation forcibly ousted the petitioner from possession of the yard. Thus the Skinner and Eddy Corporation not only lost the $500,000 paid on account of the purchase price, but also lost the $1,200,000.00 which it had expended in improving the yard.

It will be observed that the item for anticipated profits claimed in the complaint amounted to $17,303,845.25; that there were other items which were claimed

as special losses for cancellation of the ships, such as the special losses of $900,000.00 on account of materials, $500,000.00 paid on account of the purchase price of the shipyard, and $1,200,000.00 expended in betterments on the same shipyard, the possession of which was later forcibly taken from petitioner; and that all of these items in the aggregate amounted to much more than the net amount for which judgment was asked. If, therefore, the petitioner could not recover in that suit either anticipated profits or these other items, which were in the nature of just compensation for cancelling the contracts, then it could recover no judgment at all because these items aggregated much more than the net amount for which judgment was prayed.

At the time this suit was filed in the Court of Claims on June 15, 1921, the decisions with reference to the legal rights of the parties under such contracts as these had not taken definite form, but the Court of Claims, in the College Point Boat case (page 37, Exhibit "A," attached to petition herein) had held that the United States was liable for anticipated profits for the cancellation of a contract made by the Navy Department after the Act of June 15, 1917 (40 Stat. L. 182), and subsequently canceled by it; and it had been held in several District Court cases that contracts such as have been recited were contracts of the United States, and upon which the United States was liable.

Sloan vs. United States Shipping Board Emergency Fleet Corporation, 268 Fed. 624;

Astoria vs. United States Shipping Board Emergency Fleet Corporation, 270 Fed. 635;

Sloan vs. United States Shipping Board Emergency Fleet Corporation, 272 Fed. 132.

With these decisions in mind, there being at that time no decisions by the Supreme Court of the United States to the contrary, the petitioner filed its suit June 15, 1921, in the Court of Claims against the United States, seeking as its main items of recovery, anticipated profits and items in the nature of compensation for cancellation of the contracts. After this suit had been filed in the Court of Claims, that court withdrew its opinion in the College Point Boat case, and in other cases decided that the United States had a right, under the Act of June 15, 1917, to cancel its own contracts, and when it did so it was not liable for anticipated profits.

Meyer Scale case, 57 Ct. Cls. 26;
Russell Motor case, 57 Ct. Cls. 464.

In the Russell Motor case this court, by decision of April 9, 1923 (261 U. S. 514), confirmed the decision of the Court of Claims that the United States could under the Statute of June 15, 1917, cancel its own contracts and that anticipated profits could not be recovered; but that the remedy was for just compensation in the manner provided in the Act, which required the amount of just compensation to be determined by the President before suit filed. This was the first decision by this Court covering the above subjects.

The suit was begun before jurisdictional conditions existed for suing for compensation for cancellation of contracts.

After the Court of Claims had reversed itself and decided the Meyer Scale case, Skinner and Eddy realized that should this court affirm that decision,

then the amount of just compensation must be determined as provided in the statute before any cause of action existed as to such just compensation. Petitioner, therefore, on March 29, 1922, nine months after the suit had been filed in the Court of Claims, presented a formal claim to the Shipping Board, which Board, on the 14th of February, 1923, made an order fixing the amount of just compensation to which petitioner was entitled at $3,130,433.46. (Pages 11, 12, 13, Vol. II, Record.) This order, made nearly two years after Skinner and Eddy had filed their suit, could not be set up by amendment to their complaint in the Court of Claims because no amendment could remedy the fatal defect that at the time the suit was filed, no cause of action existed.

The decision of this court in The Russell Motor case settled two propositions: first, that anticipated profits, as such, could not be recovered for cancellation of such contracts; and, second, that the only remedy against the United States was for *just compensation* for such cancellation to be determined as provided in the Act of June 15, 1917. It is well established that when the United States provides a remedy against itself, that procedure is not only the exclusive remedy, but must be literally followed. (United States vs. Babcock, 250 U. S. 328; Rock Island vs. United States, 254 U. S. 141.) Inasmuch as the act required a determination by the President (afterwards the Shipping Board), as a prerequisite to commencing suit, and as no determination of the amount of just compensation in this case had been made until long after the filing of the suit, it necessarily follows that the claim for just compensation could not be recovered in the suit filed.

It was therefore perfectly apparent that in the action filed in the Court of Claims the petitioner could not recover either anticipated profits or just compensation and therefore could not recover any judgment at all because with both these items eliminated, the petition itself showed that there would be no balance due the petitioner.

The suggestion that petitioner might recover just compensation for the cancellation of the contracts by an amended or supplemental petition filed in the pending case in the Court of Claims is without support in the authorities. The determination of the amount of just compensation by the executive agency (the Shipping Board) is a condition precedent to the commencement of a suit by the contractor, and is made so by the Statute (Act of June 15, 1917, as amended by Act of June 5, 1920). Any action begun in advance of that determination must necessarily fail as to such claims.

> "But courts can not perform executive duties, or treat them as performed when they have been neglected. They can not enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled."
> United States vs. McLean, 95 U. S. 750, 753; Rock Island vs. United States, 254 U. S. 141.

If a suit is prematurely brought, no amendment declaring upon a cause of action which did not exist when the suit was commenced can cure the defect. American Bond Co. vs. Gibson County, 145 Fed. 871 (C. C. A., 6th).

Petitioner's motion and praecipe for dismissal and the Court's subsequent action.

Two days after the Russell Motor decision was handed down by this court, therefore, the petitioner filed its motion to dismiss in the Court of Claims, and at the same time presented for filing its praecipe for dismissal, the latter document being handed to the Clerk, but refused filing by him. (Page 4, Petition.) At the time the motion to dismiss was filed, although the case had been pending for nearly two years, there had been no counter-claim filed or offered. The next day after the motion to dismiss had been filed, the Government's attorney made a motion for leave to file a counter-claim, but did not offer or set out the proposed counter-claim itself. (Record, p. 6, Vol. II.)

This motion for leave to file a counter-claim was not only made after the motion to dismiss had been filed but was too late under the Rules of the Court of Claims, which rules provide:

> Rule 29. "Demurrers and pleas must be filed within sixty days after the filing of the petition, unless the court extend the time."
>
> Rule 34. "Unless the Attorney General shall, within sixty days after the service of the petition upon him, appear and defend by filing a demurrer, plea, or answer, and by filing a notice of any counter-claim, set-off, claim of damages, demand, or defense in the premises, a general traverse of the petition shall be considered as entered on the part of the defendants, and the case shall be proceeded with the same as though an answer of general traverse had been filed."

The general traverse had been duly entered by the Clerk on August 15, 1921. (Record, page 4, Volume II.)

The Court of Claims took the motion to dismiss under advisement, and on the 30th of April, 1923, granted the motion, thus effectually denying the Government's motion to be permitted to file a counter-claim.

The court having granted petitioner's motion to dismiss, and there being no longer any suit pending in the Court of Claims, the petitioner on the next day, that is, the 1st of May, 1923, filed a suit in the State Court at Seattle, Washington, against the Fleet Corporation, as a corporation, covering, with some exceptions, the same grounds of complaint. Practically the only difference was that in the suit against the Fleet Corporation no claim for anticipated profits was made. This suit was transferred, upon motion of the Fleet Corporation, to the United States Court. Motion was made to quash service of summons, which was denied, and the Fleet Corporation was held to answer. (Exhibit "C," page 66 of petition herein.)

On the 9th day of June, 1923, forty days after the Court of Claims had granted the petitioner's motion to dismiss, and thirty-nine days after suit had been filed in Seattle against the Fleet Corporation, the Government filed in the Court of Claims a motion to set aside the order of dismissal, the grounds of the motion being substantially as follows:

That on the argument of the motion the attorney for petitioner had suppressed material facts; that the petitioner had commenced another suit in the State of Washington against the Fleet Corporation; that the witnesses and documentary evidence for the prosecution of the counter-claim are in Washington, D. C., and large expense would be incurred to send them to Seattle; that there is doubt as to the right of the Fleet Corporation to assert the counter-claim, but there is no doubt of the right of the United States to assert

such counter-claim; that the United States is entitled as a matter of right to prosecute the counter-claim, and the dismissal of the petition deprives it of this right.

The Court of Claims in granting the defendant's motion placed its decision upon the grounds that the counter-claim was not too late; that the petition on its face averred claims against the United States, and therefore the court had jurisdiction; that there is nothing in the Sloan, Astoria and Wood cases decided by this court which holds that a suit against the United States cannot be maintained on such contracts as these; and finally, that the plaintiff had no absolute right to dismiss but could only appeal to the discretion of the court, and the exercise of a sound discretion required that the original order of dismissal be set aside and the United States be permitted to file its counter-claim. (Record, Page 51 et seq., Vol. II.)

GROUNDS OF PETITION

Upon these facts we make the following contentions:

I. Petitioner had an absolute right to dismiss.

II. The contracts set out in the complaint, and upon which the claim is based, are contracts with the Fleet Corporation, not with the United States; therefore, the Court of Claims has no jurisdiction over either the original claim or the counter-claim growing out of such contracts.

III. After the order of dismissal and after plaintiff had commenced its new suit against the Fleet Corporation, the court was barred from proceeding in the original cause by Section 154 of the Judicial Code, and this is a matter of jurisdiction.

IV. Counter-claim can only be allowed against a claimant against the Government, and when petitioner took steps to secure a dismissal it was no longer a claimant.

V. The question of the remedy on claims arising under contracts made by the Fleet Corporation is a question of jurisdiction which gravely affects claimants who may pursue a remedy upheld as proper by this court. It is of the utmost importance that the rule of stare decisis be adhered to in such cases, and that therefore the decision of this court in the Sloan case be followed in all like cases.

VI. The order of the court in reinstating the case was wrongful and deprived petitioner of its right to trial by jury.

POINT 1

The petitioner, the Skinner and Eddy Corporation, had the right to dismiss its suit

There seems to be an almost unbroken line of authorities holding that the plaintiff in a suit has an absolute right to discontinue or dismiss his suit at any stage of the proceedings prior to verdict or judgment, as the case may be, unless prior to the filing of the motion to dismiss or discontinue the suit a counter-claim has been filed and even after a counter-claim has been filed, under circumstances similar to those shown in the case at bar.

Veazie vs. Wadleigh, 11 Peters 54.

Confiscation Cases, 7 Wallace 454. (See page 457 of the opinion.)

Barrett vs. Virginian Railway Company, 250 U. S. 473.

In this latter case this court said (page 476 of the opinion):

> "At the common law, as generally understood and applied, a nonsuit could be taken freely at any time before verdict if not indeed before judgment. The right is substantial." (Citing cases.)

In City of Detroit vs. Detroit City Railway Company, 55 Fed. 569, the Circuit Court of Appeals for that Circuit, through Judge Taft, reviews the cases and uses the following language:

> "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was of course except in certain cases. Chicago & A. R. Co. vs. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. Rep. 594. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind."

A few of the other cases on the same point are:

> Cowham vs. McNider, 261 Fed. 714.
> McCabe vs. Southern Railway Co., 107 Fed. 213;
> Youtsey vs. Hoffman, 108 Fed. 699;
> United States ex rel Coffman vs. Norfolk & W. Ry. Co., 118 Fed. 554;
> Pennsylvania Globe Gaslight Co. vs. Globe Gaslight Co., 121 Fed. 1015;
> Morton Trust Co. v. Keith, 150 Fed. 606;
> Thomson-Houston Electric Co. vs. Holland, 160 Fed. 763.

Petitioner's case is similar in facts and identical in principle with the case of McGowan et al. vs. Co-

lumbia River Packers Association et al., 245 U. S. 352 In that case, the plaintiff had filed his suit in the United States District Court for the State of Washington, upon the assumption that the land at a certain point underneath the Columbia River was within the State of Washington. The defendant had answered, and also filed a counter-claim. After this counter-claim was filed, the Supreme Court of the United States, in another case, rendered a decision, which held that this particular land was not within the State of Washington, but was within the State of Oregon, thus depriving the District Court for the State of Washington of jurisdiction over the land in controversy, although it still had jurisdiction over the parties. The plaintiff, therefore, after this decision was rendered, moved to dismiss his case. The motion was denied by the lower court. The case was tried and a judgment had in favor of the defendant upon its counter-claim. This decision was reversed by the Circuit Court of Appeals on the ground that the motion to dismiss should have been granted, and upon appeal to the Supreme Court, the Circuit Court of Appeals was upheld. The Supreme Court held that inasmuch as the plaintiff could not possibly recover in the suit what he had anticipated at the time he filed the suit, and had been put in an unexpected position, he had a right to dismiss the case, notwithstanding the fact that a counter-claim had been already filed.

The parallel between this case and the petitioner's in the Court of Claims is striking. When petitioner filed its suit in the Court of Claims, so far as there had been any decision on the questions involved, it had been held (a) by the Court of Claims in the College Point Boat case (Exhibit "A" to petition) that

anticipated profits could be recovered in cases against the United States similar to petitioner's; and (b) it had been held by the Federal Courts, with but few exceptions, that contracts of the Fleet Corporation were contracts of the United States. With these decisions to guide it, the petitioner sued the Government on the Fleet Corporation's contracts, assuming that they were Government contracts, and not only claimed anticipated profits, but claimed other items which in a suit against the United States, as the law is now firmly established, were properly claims for "just compensation" (such as the item of $906,416.26 claimed as loss on materials purchased for canceled ships—see Exhibit D, Volume I, page 11) upon which suit could only be brought after a determination as provided by the Acts of Congress.

After suit was filed, not only did the Court of Claims reverse its former decision in the College Point Boat case, but the Supreme Court of the United States, in the combined Sloan, Astoria, and Eastern Shore cases, 258 U. S. 549, established the law to be that under contracts with the Fleet Corporation similar to the Skinner and Eddy Corporation contracts, suit would properly lie against the Fleet Corporation, but not against the United States.

And in the Russell Motor case, this court decided that in cases of this character against the United States anticipated profits could not be recovered, but the remedy was for just compensation after the determination of the amount of such just compensation in the manner provided in the statute.

In the light of the above-mentioned decisions, it was obvious that petitioner had misconceived its remedy in two vital respects, first, under the Astoria decision

the suit was properly against the Fleet Corporation and not against the United States, and, second, even if properly against the United States, petitioner could not, under the Russell Motor case, recover in the suit filed either anticipated profits or just compensation, and, therefore, could not make any recovery at all. It, therefore, filed its motion to dismiss in the Court of Claims, and at the same time filed, or attempted to file, a praecipe for dismissal, this latter document being refused acceptance by the Clerk.

It was exactly so in the McGowan case, where the plaintiff, after the decision of the Supreme Court, found he could not recover what he had set out to recover, and therefore filed his motion to dismiss, which motion the Supreme Court held should have been allowed, notwithstanding the fact that a counter-claim was already on file. The McGowan case is therefore authority for holding in the present case that even if the Government had filed its counter-claim prior to the motion to dismiss, that nevertheless the motion to dismiss ought to have been granted. How much stronger is the right to dismiss when at the time the motion was made no counter-claim had been filed or offered.

POINT II

The contracts set out in the petition, upon which both the claim of petitioner and the counter-claim of the United States are based, are contracts with the Fleet Corporation, not contracts with the United States; therefore the Court of Claims has no jurisdiction over either the original claim or the counter-claim.

The jurisdiction of the Court of Claims is a limited jurisdiction covered entirely by the statute, and embraces only such subject matters as the statute covers. This jurisdiction is defined and limited by Section 145 of the Judicial Code, which is as follows:

> "Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "First. All claims (except for pensions) founded upon the Constitution of the United States, or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages liquidated or unliquidated in cases not sounding in tort in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States was suable. * * *
>
> "Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the Government in said court * * *."

It will thus be seen that unless the contracts, which are set out in full in the complaint and upon which

contracts both the claim of the petitioner and the counter-claim of the United States are founded, are contracts of the United States, then the Court of Claims has no jurisdiction of the subject matter of either the complaint or the counter-claim.

With this point in mind, let us examine the contracts which form the basis of the complaint, to determine whether or not these are contracts of the United States.

The first contract between these parties is dated May 28, 1917 (Record, page 45, Volume I). At that time the Act of June 15, 1917, had not been passed. The President had not yet been given authority to make such contracts, and it was not until the executive order of July 11th, delegating the Presidential authority to the Fleet Corporation, that the Fleet Corporation had any authority to represent the United States. So we find here these parties making a contract at a time when the Fleet Corporation must have been contracting for itself, for the reason it had no authority to contract for any one else, and, indeed, the contract does not in any manner even suggest that any one is to be bound by the contract except the Fleet Corporation. The words "representing the United States" are of course omitted from this contract.

This contract was modified by what was called a supplemental contract. This supplemental contract was made on the 16th of February, 1918, at a time when the Fleet Corporation had received its delegation of authority from the President, and this contract does use the words "representing the United States of America." (Record, page 58, Volume I.) This supplemental contract contains the following recital:

> "Whereas, on May 28, 1917, the parties hereto entered into a certain contract."

In other words, here is a recognition that the parties to this supplemental contract are the same parties that executed the original contract.

Throughout both the original and the supplemental contracts the word "Owner" is used to describe the Fleet Corporation. It is interesting to note that likewise in every contract between these parties the word "Owner" is used to designate the Fleet Corporation. The word "Owner" in the suplemental contract is used repeatedly throughout the contract to mean the same party that it meant in the original contract. For example, in the third paragraph (page 58) it is recited that the

> "• • • practice and detail incident to the plan of cost accounting necessitated by the terms of the original contract are delaying the *construction of said vessels for the Owner.*" (Italics ours wherever used in this brief).

Again, on page 61, paragraph "1" provides that the "Owner" will pay the purchase price of the ships, and paragraph "2" provides that •

> "Payments heretofore made by the Owner under the original contract will be credited • • •"

So it is conclusively established that the party designated in each of these two contracts as the "Owner" is one and the same person, and that person is the Fleet Corporation.

With this same point in mind, let us turn to the letter of May 11, 1918 (Record, page 236, Vol. I). One

of the principal parts of this contract provides for the lease and sale of a shipyard by the Fleet Corporation to Skinner and Eddy. The Fleet Corporation had just purchased this yard the preceding day. The contract of purchase is set out at page 239. In that contract of purchase there is nothing to indicate that the United States was the party purchasing the plant, the Fleet Corporation, according to the contract, being itself the purchaser. At that time—May 10, 1918—Congress had not authorized the President to purchase shipyards. The only authorization is found (40 Stat. L. 182) in sub-division "(d)" of the Emergency Shipping Funds provisions of the Act of June 15, 1917. That sub-division authorized the President as follows:

> "To requisition and take over, for use or occupation by the United States, any plant or any part thereof."

The word "requisition" does not mean to purchase by negotiation. This is made emphatic by the very next sub-division (sub-division "e"), wherein the President is authorized as follows:

> "To *purchase*, requisition or take over title to * * * any *ship*."

In the latter instance Congress did authorize either the purchase or requisition of ships, but carefully refrained from authorizing anything but the requisition of plants. This is made still more emphatic by the fact that Congress on November 4, 1918, amended this sub-division "(d)," which had previously authorized the President to requisition plants, by giving him also the power to *purchase* or otherwise acquire title to

plants, in addition to his previous power of requisition. (40 Stat. L. 1022.)

In view of this state of the law, and in view of the fact that the purchase contract itself does not even purport to be made on behalf of the United States, but on its face is made by the Fleet Corporation, it is, we think, fair to state that it must be concluded that the purchase of this yard was by the Fleet Corporation for itself.

This yard having been purchased, the Fleet Corporation the very next day agreed to sell it to Skinner and Eddy. This also it must have done in its corporate capacity for the reason that at that time no Congressional authority had been given either the President or the Fleet Corporation for the disposal of property. Congress did, however, on the 19th of July, 1919 (41 Stat. L. 181), more than a year after this yard had been sold, in the Sundry Civil Appropriation Act, provide that materials or plants

> "acquired by the United State Shipping Board Emergency Fleet Corporation may be disposed of as the President may direct."

It is fundamental that agencies of the Government cannot dispose of Government property except in accordance with some act of Congress.

This contract of May 11, 1918, is the foundation of by far the larger part of the dealings between the Fleet Corporation and this claimant. It provides for the construction of fifty ships at a contract price of almost $100,000,000.00, and it was contracts for some of these same ships which were afterwards canceled, and which gave rise to a large portion of plaintiff's claim. This contract is an indivisible contract. With-

out the contract to lease and sell the shipyard, the petitioner could not have undertaken to build the ships, because a large number of the ships were to be built in the yard so agreed to be leased and sold. It then follows that as the Fleet Corporation, representing the Government, had no authority to either lease or sell this yard, it must have been acting for itself and in its own corporate capacity, and not as a representative of the Government, when it made this contract.

Let us turn then to the formal contract for the thirty-five ships, which was made in pursuance of this letter, and examine this contract for the purpose of determining whether it was a contract of the Fleet Corporation or of the United States. This contract is selected because it is the largest contract, and typical of all the others. This contract was made on the 1st of June, 1918, in pursuance of the letter of May 11th, and provides for the building of the thirty-five ships. It is a contract

> "Between Skinner and Eddy Corporation, * * * (herein called the Contractor), and the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the District of Columbia (herein called the Owner), representing the United States of America." (Record, page 270, Vol I.)

All of the obligations and undertakings on the part of the second party are set out as obligations of the "Owner." It is the "owner" that is to perform the entire contract, there being no obligation whatever on the part of any one else. It is agreed on page 272, paragraph "II," that the "owner" will pay the money for the ships. It is further agreed that the "owner"

shall inspect and, if satisfactory, accept the vessels. It is the "owner" that is to authorize extra payments for wages if men are employed on holidays; it is the "owner" that must pay additional freight rates, if any are incurred; it is the "owner" that shall have the right to make alterations; it is the "owner" that can, for certain reasons, excuse delay in the building of ships; it is the "owner" that may declare the contract forfeited under certain conditions; it is the "owner" (page 281) that agrees to pay a premium for deliveries earlier than the contract dates. And so through the entire contract every obligation on the part of the second party is expressed to be the obligation of the "owner." There is no obligation whatever on the part of the United States, unless the United States is itself the "owner" under the contract. It, therefore, becomes most important to determine who is meant by "owner."

We find on page 274 a provision that all defects that develop within six months after the vessel is accepted, shall be "repaired to the satisfaction of the *Director General* of the *Owner.*" The Fleet Corporation did have a Director General, but so far as we are aware, the United States has no such officer.

On page 278 it is provided that if the Contractor be delayed in the work by any act or neglect of the "Owner," or

> "by reason of alterations or additions by the Owner, or the commandeering by the United States Government of materials," or "by reason of instructions or orders given by the Owner or the United States,"

then the time of delivery shall be extended for an equivalent period. Here is a clear distinction between

the "owner" and the United States. Then it provided that no request for extension of time shall be considered unless the Contractor shall, in writing, within thirty days, notify the Director General of the "Owner."

On page 279 it is provided that the "Owner" may forfeit the contract if the progress made is unsatisfactory, but if the Contractor can show to the satisfaction of the Director General of the "Owner" reasonable industry and good faith, then the Contractor shall be allowed such opportunity to complete the work as the Director General of the "Owner" may deem reasonable.

On the same page it says that title to all vessels, so far as they have been inspected and approved by the "Owner," shall be in the United States, and the title to all material shall be in the "Owner."

On page 280 it is the Director General of the "Owner" that is to decide disputes.

On page 287 it is provided that the Contractor shall put in additional protection against espionage and acts of war. The contract says that the Contractor shall, at its own cost, provide such additional watchmen, guards, and

> "devices for the protection of its plant property, and of the work *in progress for the United States Shipping Board Emergency Fleet Corporation.*"

Again, on page 289, occurs this provision:

> "It is recognized in view of war conditions, that it may become necessary for the United States to exercise control over the manner and priority in which materials and equipment are obtained

under this contract. It is agreed between the parties hereto that if it is desired by the Owner and/or the United States, that all contracts and agreements for equipment and materials to be used under this contract shall be submitted to the Owner and/or the United States, and that any orders given to the Contractor by the Owner, or the United States with regard to such contracts and agreements, will be promptly complied with by the Contractor."

It is impossible to argue, after considering these provisions of the contract, that the Owner mentioned in the contract is other than the Fleet Corporation itself. This being established, we find it is only the Owner that has any obligations under the contract. The United States has agreed to do nothing. It is true that the title to the ships, according to the contract, was to be vested in the United States, but the United States has assumed no obligations under the contract. Every commitment, every promise, every undertaking, is a commitment, a promise, or an undertaking of the Fleet Corporation.

The Fleet Corporation was organized with a capital of $50,000,000, which was provided by Congress. With that money it could purchase and build ships without obligating the United States in any manner, and that is exactly what it did. (Witness the first contract with the Skinner and Eddy Corporation in this case.) The Emergency Shipping Fund provision of the Act of June 15, 1917, which appropriated some hundreds of millions of dollars for the purpose of building ships, provided (40 Stat. L. 183):

"That the President may * * * expend the money herein and hereafter appropriated, through

> such agency or agencies as he shall determine from time to time; *Provided*, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other monies of said Corporation are now expended."

The "other monies" of the Fleet Corporation were the $50,000,000 capital, which it could expend without obligating the United States. It is therefore apparent that, while Congress appropriated the money, it was expected that the Fleet Corporation would make its own contracts and be liable thereon in its own person. And that is apparently just what was done when the Fleet Corporation made this contract, because the contract nowhere attempts to bind the United States to do anything, or to obligate the United States in any manner, the only person being bound or obligated being the Fleet Corporation. This is what, we presume, Mr. Justice Holmes had in mind when he said in the Astoria case that

> "It was expected to contract and to stand suit in its own person whatever indemnities might be furnished by the United States."

Every question as to liability under these contracts is settled by the decision of the Supreme Court in the combined cases of Sloan Shipyards, Astoria Marine Works, and Wood, Trustee, 258 U. S. 549.

Having shown by the contracts themselves that they are not contracts of the United States, it is equally clear that this court has already passed upon this question and settled the status of such contracts as these and the entire question of liability under them, in its

decision in the combined case of Sloan, Astoria and Wood above cited. In that combined case, the court said (258 U. S. 565):

> "The Shipping Act contemplated a corporation in which private persons might be stockholders and which was to be formed like any business corporation under the laws of the District, with capacity to sue and be sued. The United States took all the stock, but that did not affect the legal position of the Company."

Also, at page 568:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect."

The foreging extracts are from that part of the opinion which deals with the Sloan case. It is to be noted that the expression occurring in this part of the opinion (p. 567),

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act."

has reference only to the cause of action alleged by Sloan, which was a suit for equitable relief based in part on alleged tortious acts. There is no language in the subsequent part of the opinion dealing with the Astoria case or Eastern Shore case that intimates

any doubt about the party who is liable on contracts of this character.

In dealing with the Astoria case the Court analyzes the contract, and notes that it also contains the words, "representing the United States of America." It must be borne in mind that in this case the lower court had dismissed the case on demurrer on the ground that the contract sued upon was a contract of the United States, and therefore the District Court was without jurisdiction, the only remedy being in the Court of Claims. On error to this court this judgment was reversed on the ground that the contract was a contract of the Fleet Corporation and not a contract of the United States. This court said (p. 569):

> "Throughout the contract the undertakings of the party of the second part are expressed to be undertakings of the Corporation and it is this corporation and its officers that are to be satisfied in regard to what is required from the Iron Works. It is recognized that it may be necessary for the United States to exercise complete control over the furnishing of supplies to the Iron Works and it is agreed that if required by the Corporation 'and/or the United States' the Iron Works will furnish schedules, etc., etc. The whole frame of the instrument seems to us plainly to recognize the Corporation as the immediate party to the contract. The distinction between it and the United States is marked in the phrase last quoted. If we are right in this, further reasoning seems to us unnecessary to show that there was jurisdiction of the suit. The fact that the corporation was formed under the general laws of the District of Columbia is persuasive, even standing alone, that it was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States."

The issue in the Astoria case was whether the contract was a contract of the United States or a contract of the Fleet Corporation. The lower court held that it was a contract of the United States and therefore there was no jurisdiction in any court except the Court of Claims. But on appeal to this court, that decision was reversed in the decision above quoted, which holds squarely and unequivocally that the contract is a contract of the Fleet Corporation and not a contract of the United States.

In the last of the three cases, the Eastern Shore case (United States Fleet Corporation vs. Wood, trustee), the claim which was under consideration arose under a contract similar to that last described, made by that company with the Fleet Corporation, "representing the United States of America," to construct six harbor tugs.

By referring to the opinion of the Circuit Court of Appeals, 274 Fed. 893, we find that the contract in question was in every essential particular the same as the contracts in the case at Bar, namely, construction contracts for the construction of vessels, and entered into by the Fleet Corporation.

It appears from that opinion that the Fleet Corporation advanced to the Shore Shipbuilding Corporation under this contract $428,017.72, and that after the adjudication of bankruptcy the Fleet Corporation was compelled to expend $135,161.65 in order to complete and take delivery of the tugs. In no essential particular, therefore, did the claim differ from the claim asserted against Skinner and Eddy Corporation in the counter-claim under the contracts in the case at bar.

The opinion of the Circuit Court of Appeals, after referring to the powers conferred upon the Fleet Cor-

poration by the several acts of Congress and executive orders, says (274 Fed. 902):

> "We are told that a contract made in the name of a public agent will be construed to be a contract of the government and not of the agent. Huffcut on Agency (2d Ed.) p. 254. This is to lose sight of the fact that the Fleet Corporation contracted as a principal in its contract with the bankrupt. It designated itself throughout the contract as owner, and was careful to distinguish between itself as owner and the United States, and the debt due from the bankrupt under the contract is a debt due to it as a principal and *not to the United States.* * * * It follows, therefore, that a debt due to the United States Shipping Board Emergency Fleet Corporation from the bankrupt herein *is not in law a debt due to the United States.*"

The decision of the Circuit Court of Appeals was therefore placed clearly on the ground that the indebtedness was not one due to the United States but to the Fleet Corporation. This court affirmed the judgment, using the following language (258 U. S. 570):

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern District of New York, under a contract similar to that last described, made by that Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. It was denied successively by the referee, the District Court and the Circuit Court

> of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case."

The court therefore affirmed the judgment for the considerations just previously stated in the Astoria case. Those considerations were briefly: That the Fleet Corporation was the immediate party to the contract, and that it was expected to contract and to stand suit in its own person; so that the conclusion is unavoidable that this court did hold that the indebtedness was not one due the United States, but was one due to the Fleet Corporation. The contract in that case, in all its essential elements, was exactly like the contracts in the case at bar. The money which was sought to be recovered had been advanced in identically the same way, and when this court held that the money advanced in the Eastern Shore case was not a debt due to the United States, it necessarily settled also that the alleged indebtedness set up in the present counter-claim is not a debt due to the United States. Beyond question, therefore, this court, in deciding these three cases, definitely held not only that the Fleet Corporation is liable on such contracts, but also that the United States is not liable.

There is no ground for the claim that the decision of the Supreme Court in the Sloan-Astoria-Eastern Shore case is to be confined either to a decision

(1) That only the question of jurisdiction was determined, leaving open the question of substantial liability under the contract; or

(2) That it was determined that the Fleet Corporation is liable on such contracts but that the question of the liability of the United States was left undetermined.

As we have pointed out, while jurisdiction was discussed and considered, the decision on jurisdiction was placed distinctly upon the ground that the contracts are not contracts of the United States.

There is nothing in the opinion of the Supreme Court which in any way holds open the question of liability of the United States under these contracts. As above stated, the expression in the opinion of the court, "even if they might have sued the United States," occurs only with respect to the tortious acts in the Sloan case, and does not appear in that part of the opinion devoted to the other two cases where the contractural liability under the contract was involved. The expression in that part of the opinion dealing with the Astoria case that the Corporation "was expected to contract and to stand suit in its own person, whatever indemnities might be furnished by the United States," is not open to the claim asserted by counsel for respondents. The word "indemnities" was undoubtedly used in a very general sense, and was inserted because of the fact that in some general way the United States might be expected to "stand behind" the Fleet Corporation in view of the appropriations of money made to it, and which, under the Act of June 15, 1917, were to be "expended as other moneys of said Corporation."

Until the effort was made, after the decision of this Court in the Sloan, Astoria and Eastern Shore cases, to limit the effect of that decision so as to make it practically a moot decision, the claim had never been advanced that a contract made by a public agent in

behalf of the public authority could bind both the agent and the public authority. In the brief filed in behalf of the Fleet Corporation in the Sloan, Astoria, and Eastern Shore case, quoted in extenso in 258 U. S. 553, the proposition is asserted that "An agent of the government is not liable upon contracts made by him on its behalf." In support of this proposition, the Fleet Corporation cited Hodgson vs. Dexter, 1 Cranch 345, and other cases, which they will undoubtedly again cite. The question before the court was whether the contracts were those of the Fleet Corporation or of the United States. No one claimed that they were contracts of both entities. The determination of this court that the contracts are contracts of the Fleet Corporation necessarily excluded the claim that they are contracts of the United States, and as we have pointed out, the reasoning by which the conclusion was reached is fatal to the claim that both the Fleet Corporation and the United States could be liable upon the contracts.

Subsequent interpretation of the decision of the Supreme Court in the Sloan, Astoria, and Wood, Trustee (Eastern Shore) case, by Lower Courts.

(a) The interpretation of that decision by the several Circuit Courts of Appeals supports the position of petitioner, Skinner and Eddy Corporation.

U. S. vs. Matthews (C. C. A. 9th), 282 Fed 266.
U. S. Fleet Corporation vs. Banque Russo (C. C. A. 3rd), 286 Fed. 918.
U. S. vs. Wood, Trustee (C. C. A. 2nd), 290 Fed. 109.
Providence Engineering Corporation vs. Downey Shipbuilding Corporation (C. C. A. 2nd), 294 Fed. 641.

In The Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 Fed. 641, decided by the Circuit Court of Appeals of the Second Circuit on November 5, 1923, the question of the status of contracts made by the Fleet Corporation "representing the United States of America" was directly involved. The claim was made that the United States, not the Fleet Corporation, was the real party in interest in a contract so made. This contention was denied by the Circuit Court of Appeals on the authority of the Sloan (and combined cases) decision, and it was held that contracts so made by the Fleet Corporation are solely the contracts of the corporation, the Court saying (p. 648):

> "That question is not now an open one in this Court in view of the decisions in the Supreme Court of the United States."

and citing the Lake Monroe, 250 U. S. 246; United States vs. Strang, 254 U. S. 491; Sloan Shipyards vs. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549, and United States Shipping Board Emergency Fleet Corporation vs. Sullivan, 261 U. S. 146.

Referring to the contention that under the Sloan decision the United States might have a cause of action as the real party in interest under contracts of this character because of the expression appearing in the opinion of the Supreme Court that "the Fleet Corporation was the contractor, even if the added words had any secondary effect," the Circuit Court of Appeals said (p. 658):

> "On contracts made by the Fleet Corporation acting merely as the agent of the Government, no action could be maintained by or against it on any contract so made."

The court then quotes from the decision of Mr. Justice Field in Sheets vs. Selden's Lessees, 2 Wall 177, 187, to the effect that where a deed is executed or contract made on behalf of a state by public officer duly authorized, "In such cases the state alone is bound by the deed or contract and can alone claim its benefits." And also referring to Parks vs. Ross, 11 How. 362, 374, where this court again made a similar ruling, the Circuit Court of Appeals concluded that no room exists for holding that the United States can be regarded as a party to such a contract in view of the decision of this court. The court said (p. 658):

> "What has been said makes it plain that the Fleet Corporation must be regarded as the real party to the contract and is the real party in interest. If the Fleet Corporation was not the contractor and simply made the contract on behalf of the United States, as its agent, then in accordance with the doctrine announced in Sheets vs. Selden's Lessees, and in Parks vs. Ross, the Fleet Corporation would not be responsible on the contracts it made as representing the United States. But as we have seen from the Astoria Marine Iron Works case, Supra, the Supreme Court holds that the Fleet Corporation is liable on its contracts even though in making them it uses the words 'representing the United States of America.' We see no escape from the conclusion that the United States is not the real party in interest under the three mortgages given by the Downey Corporation to the Fleet Corporation."

(b) The subsequent interpretation placed by the Supreme Court on the decision in the combined cases of Sloan Shipyards, Astoria Iron Works, and Wood, Trustee (Eastern Shore Corporation), 258 U. S. 549, is in accordance with the position here taken by petitioner.

U. S. Fleet Corporation vs. Sullivan, 261 U. S. 146.

U. S. vs. Wood, Trustee—U. S.—(decided by this Court November 19, 1923.

U. S. Fleet Corporation vs. Chase National Bank,—U. S.—(Certiorari denied by this Court March 3, 1924).

In the United States Shipping Board Emergency Fleet Corporation, Petitioner, vs. Chase National Bank (The Downey Shipbuilding case) this court on March 3, 1924, denied the petition of the Fleet Corporation for a Writ of Certiorari to review the decision of the Circuit Court of Appeals of the Second Circuit in Providence Engineering Corporation vs. Downey Shipbuilding Corporation, 294 Fed. 641, hereinbefore cited and discussed.

In view of the very extensive analysis made by the Circuit Court of Appeals in the Downey case of the opinion and holding of this court in the Sloan, Astoria and Eastern Shore case, 258 U. S. 549, and in view of the interpretation which it put upon that case, it is fair to assume that in denying the Writ of Certiorari this court approved that interpretation.

The allegation in the petition that these contracts were made on behalf of the United States is a conclusion of law contradicted by the contracts themselves, which are set out in full.

Having established that these contracts are contracts of the Fleet Corporation and not of the United States, it follows that the Court of Claims has no jurisdiction over such contracts and necessarily could not have jurisdiction over the counter-claim of the Government based on such contracts. It is true that we alleged in our petition in the Court of Claims that these contracts were made by the Fleet Corporation, representing the United States in behalf thereof. But this is not an allegation of fact, but a mere conclusion of law, which is contradicted by the contracts themselves, which are set out in full. No evidence could be offered to support such an allegation. It would be incompetent to ask the officers of the Fleet Corporation as to whether or not they intended to bind the United States when they signed the contract. The contract says that the Fleet Corporation shall pay for the ships; manifestly no evidence could be introduced to show that the United States and not the Fleet Corporation was obligated to pay. The plain positive terms of a formal written contract cannot be contradicted in any such manner. And when we alleged in our petition that these contracts were made by the Fleet Corporation in pursuance of the authority granted by Congress, and by it representing the United States and in its behalf, we were merely alleging a conclusion of law that is contradicted by the contracts themselves.

Of course, no mere conclusions of the pleader, saying that the contracts in question are contracts of the United States, can make them such. Gold Washing Co. v. Keyes, 96 U. S. 199, and innumerable other cases in this Court. The jurisdiction of the Court of Claims is limited by statute, and in order for that court to proceed, it must appear in the petition of the

claimant that the suit is based on contracts of the United States. In this case it affirmatively appears that the contracts alleged, under the definite holding of this court, are not contracts of the United States and the jurisdiction wholly fails.

POINT III

Court of Claims is Barred From Proceeding by Reason of Section 154 of the Judicial Code

Section 154 of the Judicial Code (36 Stat. L. 1138) is as follows:

> "Sec. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect of which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

It is apparent that this statute effectually prevents petitioner from prosecuting the case in the Court of Claims for the reason that it has filed suit against the Fleet Corporation to recover on a large number of the same items that are set forth in the petition in the Court of Claims. This course of procedure is apparently the correct procedure on contracts of this character, as is evident by the cases herein cited.

That this Section is a matter of jurisdiction, and therefore deprives the Court of Claims of the power to proceed with the case, is obvious from the nature of the powers given that Court. The Government of the United States is not liable to be sued except with its consent, and whatever limitations Congress places

upon that consent limits the court's jurisdiction to the full extent of such limitations.

In the case of the United States vs. Waddell, 172 U. S. 48, it was held that the six-year statute of limitations against the United States was jurisdictional.

In Finn vs. United States, 123 U. S. 227, the matter is argued at some length by the court. In that case a suit was brought upon a claim barred by the six-year statute. The court said (page 231 of the Opinion):

> "We are of opinion that the claim here in suit—although by reason of its character 'cognizable by the Court of Claims'—cannot properly be made the basis of a judgment in that court. As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. * * * The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States."

And finally the court held that since the Government of the United States has assented to a judgment being rendered against it only in certain classes of cases, that any limitation upon the cases in which judgment could be rendered against it was a condition or qualification of the right to a judgment, and therefore extended to the powers of the court itself.

It is, therefore, certain that if the petitioner had asked the Court of Claims to reinstate the suit at the time the Government asked for such reinstatement, that the court would have had no power to have made such order, and it must necessarily be true, therefore,

that the court had no power to make such order on the motion of the Government, and its order restoring the case was an assumption of a power or jurisdiction which it did not possess. Moreover, the petitioner cannot appeal either from the order nor from a final judgment in the case, should one be rendered, because it is prohibited from doing so by this same Section of the Judicial Code.

> Corona Coal Co. vs. United States, decided by this Court January 7, 1924.

As petitioner cannot appeal either from the order nor from a judgment, it has therefore no remedy against the order complained of other than the writ prayed for in the petition herein.

POINT IV

Counter-claim by Government Can Only be Allowed Against a Claimant Against the Government

Section 145 of the Judicial Code (36 Stat. L. 1137) provides as follows:

> "Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters: * * *
>
> "Second. All setoffs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said Court. * * *"

The language is perfectly plain. When a claimant moves for dismissal of a cause, he is no longer a claimant against the Government in said court, and there

is therefore no longer any jurisdiction in the court to receive, hear, or determine any such counter-claim.

The Constitution of the United States guarantees to its citizens the right of trial by jury in lawsuit involving claims of a legal nature. All statutes in any way limiting or qualifying such right must receive such reasonably strict construction as will give full effect to the constitutional guaranty. It is undoubtedly true that any claimant who comes into the Court of Claims and avails himself of the privilege of suing the Government, thereby waives the right to a jury trial on any claim which the Government may set up against him. But when a petitioner dismisses his claim prior to the assertion of the Government of any counter-claim, he ceases to be a claimant.

The notice to dismiss was notice to the court and to the Government that petitioner was no longer a claimant; that it claimed nothing in said suit.

The Court of Claims is not a court of general jurisdiction but a special statutory court. There are, therefore, no general presumptions in its favor in regard to jurisdiction. Undoubtedly the statute creating the court and defining its powers and jurisdiction is to receive a reasonable construction so as to reasonably carry out the purpose which Congress must have had in mind in creating the court. That purpose, however, is not to be lost sight of. That purpose was to create a court where the citizen may sue the Government. The primary, and practically the only purpose of the act is to afford to the citizen a tribunal where he may assert causes of action against the Government as to which without such court he would be remediless. This, as stated, is the only real object of creating the court. The section giving to the Govern-

ment the right to file a setoff is purely a dependent and subordinate clause intended to be defensive only and never offensive. It is a shield for the Government and not a sword. To hold, therefore, that the Government may sue in the Court of Claims a citizen who has taken the proper steps to get out of the court, and is no longer the wager therein of a claim against the Government, would be to give the court by judicial construction, a purpose and a power contrary to the obvious meaning of the act which Congress must have had in mind in establishing such a court.

When plaintiff filed its motion to dismiss its petition, and when this motion to dismiss was granted, and when the petitioner followed this dismissal by commencing a new suit against the Fleet Corporation, thus putting it out of its power to file or prosecute a claim against the United States, it ceased as effectually as possible to be a claimant against the United States. There can be no more effectual manner of ceasing to be a claimant than this, and to permit the Government now to file a counter-claim and to compel the petitioner to answer that counter-claim in the Court of Claims, is in effect, permitting the Government to file an absolutely new action against the petitioner in the Court of Claims, and to prosecute that action when the petitioner is barred from presenting its own case, even as to $3,130,433.46 which the Shipping Board allowed as just compensation.

POINT V

The Question of the Remedy on Claims Arising Under Contracts Made By the Fleet Corporation Is a Question of Jurisdiction Which Gravely Affects Claimants Who May Pursue a Remedy Upheld as Proper by This Court. It is of the Utmost Importance That the Rule of Stare Decisis Be Adhered to in Such Cases, and That Therefore the Decision of This Court in the Sloan Case be Followed in All Like Cases.

Whether a judgment may run against the Fleet Corporation or against the United States, the contractor is obliged to rely in any event upon a payment from the Treasury of the United States, which payment the Congress of the United States is free to grant or withhold. In any event, also, at least in cases involving large amounts, the law will be settled by the Supreme Court in each case.

In matters of jurisdiction which involve considerations of procedure and venue, as in all questions of practice, the most important consideration is that of stability and uniformity. The rule of stare decisis applies most forcibly, both on grounds of reason and authority, to questions of that character, as it is obvious that changing the rules of procedure or of venue may have the effect to defeat litigants having just claims who have relied upon the rules first announced and have brought their suits accordingly.

On May 1, 1922, the Supreme Court held that the remedy of the contractor under contracts made by the Fleet Corporation "representing the United States of America" is by suit against the Fleet Corporation in the courts of ordinary jurisdiction sitting in the respective localities where that defendant may be

found. Sloan and Combined Cases, 258 U. S. 549. Two years have elapsed since that decision.

As the Fleet Corporation was incorporated in April, 1917, and its main activities were exercised during the year or two next following, and contracts of the character here involved were numerous during that period, it is plain that the statute of limitations has already begun to run on many claims or many items arising under such contracts.

There is every just consideration, therefore, in favor of the adherence by this court to the rule announced in the Sloan (and combined cases) decision, upon which it is plain that many litigants having just claims have relied. If it were possible for this Court to hold now that the remedy on such contracts is by suit against the United States in the Court of Claims, no argument is needed to show the injustice that would necessarily result to many citizens who have acted and relied upon the definite holding of this Court that such contracts are contracts of the Fleet Corporation, and that a suit against that defendant is the remedy of the contracting citizen.

It is further to be noted that although the dissenting opinion in the Sloan (and combined cases) decision called the attention of Congress to the possible advisability of changing the rule as laid down in the opinion of the Court, that the remedy of the contractor is by suits against the Fleet Corporation in the several local common law courts, nevertheless Congress has made no enactment in any way changing or qualifying the rules of procedure and venue laid down in the opinion of the Court. The absence of Congressional action clearly indicates the desire of the law-making power that the remedy of the contractor should not be by suit against the Government in the Court of Claims,

but should be by suit against the Fleet Corporation as against ordinary private corporations. Congress has therefore definitely declined the suggestion of vesting the Court of Claims with jurisdiction to determine claims of this character.

POINT VI

Wrongful Order of Court Deprived Petitioner of Its Right to Trial by Jury, and Writ Asked Is Proper Remedy for This Wrong.

The only possible object in reinstating the case after once dismissing it is to allow the Government to file and prosecute its affirmative action against petitioner in the Court of Claims, and thus deprive petitioner of its right to trial by jury.

The Government could, of course, at any time file suit in the United States Courts other than the Court of Claims, and have it determined in such action whether the petitioner was or was not indebted to the Government in the amount claimed, or in any other amount, but on that issue and in that case the petitioner would have a right to trial by jury.

In the matter of Simons, 247 U. S. 231, where the lower court had transferred a certain cause from the law side of the court to the equity side of the court, thus depriving the appellant of the right to trial by jury, the court said:

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

and the writ was granted requiring the lower court to restore the cause to the law side.

In Ex Parte Peterson, 253 U. S. 300, the lower court had appointed an auditor with instructions to make an investigation as to the facts, hear the witnesses, examine the accounts, and make a report. The plaintiff therein applied to the Supreme Court for a writ of mandamus and/or prohibition commanding the lower court to proceed with the trial in the regular way, and that it be prohibited from proceeding under the order. The Supreme Court said, page 305 of the Opinion:

> "It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex Parte Simons, 247 U. S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held, to have been required under a mistake.'"

The Court then held that the order did not deprive plaintiff of his right to trial by jury, and therefore denied the writ.

In this case, as the order complained of was a wrongful order which deprived petitioner of its right to trial by jury, it should be dealt with by this Court now. It would be a great hardship if the plaintiff

should be compelled in the Court of Claims to defend against the Government's suit, going through months, and perhaps years, of taking testimony of innumerable witnesses, and long, complicated, and voluminous accounts examined and put in evidence, and then find that all this labor had been for naught because of the wrongful order of the court in reinstating the cause to permit the Government to file a counter-claim seven months after the original cause had been dismissed.

RESPONSE OF COURT OF CLAIMS

Since the foregoing part of this brief was written, we have received a copy of the response of the Court of Claims to the rule issued by this court. The response does not take away anything from the force of what has hereinbefore been said, but it does seem appropriate to reply briefly to the reasons advanced in the return as a justification of the order of the court, setting aside the original order of dismissal and allowing the United States to file a counter-claim.

The return sets out a number of details that were not called to the court's attention on the argument of the original motion to dismiss, the presumption apparently being that had such details been called to its attention, the court would have been justified in denying the original motion to dismiss, and was therefore justified in setting aside the order of dismissal when such details were brought to its notice.

It is our position that none of these details had any bearing whatever on the motion to dismiss. The points which were not called to the court's attention, according to the response, are as follows:

a) It was not shown that petitioner's claim had been presented to the Shipping Board on December 31, 1920, more than six months prior to the filing of petitioner's suit.

The answer to this is that the claim was not presented to the Shipping Board on December 31, 1920, but on December 28, 1920, it was presented to the Auditor for State and Other Departments, and by him later transmitted to the Shipping Board (R. page *43, Vol. II.*) It is true that on December 31, 1920, petitioner, at Seattle, handed to E. R. West, one of the counsel of the Shipping Board and Fleet Corporation, at request of West, a brief unsworn summary or recapitulation of petitioner's claim which had been filed with the Auditor for the State and Other Departments. (Record, pages 20 and 47-48-49, Volume II). The record of correspondence with the Fleet Corporation (Record, pages 44-47, Volume II) shows that petitioner considered the claim as being in the hands of the Auditor with whom it had been filed, and did not expect or desire the Shipping Board to pass on it. The presentation of petitioner's claim to the Shipping Board (brought about by the decision of the Court of Claims in the Meyer Scale case) was made March 29, 1922, nine months after petitioner's suit was begun in the Court of Claims. Even if these circumstances can be construed to be a presentation of the claims to the Shipping Board prior to the commencement of the suit, then that fact is immaterial because it is not *presentation* of the claim which the statute of June 15, 1917, requires as a prerequisite to filing suit, but a *determination* of that claim.

(b) It was not shown to the Court that an award of just compensation had been made by the Shipping Board on February 14, 1923.

The answer is that a determination of just compensation is required by the statute before a cause of action accrues, and a cause of action accruing after complaint filed cannot be made the basis of a judgment on a complaint filed before the cause of action existed.

(c) Attorney for petitioner did not mention that he had made a written request for a copy of the resolution of the Shipping Board fixing just compensation, nor that the Shipping Board had mailed him such copy, nearly a month before the motion to dismiss was filed.

The answer is that the determination of just compensation after suit, being immaterial, it is equally immaterial that petitioner's attorney asked for and received a copy of the resolution determining the compensation.

(d) It was not brought to the Court's attention that the complaint included certain other causes of action stated in the return to be "within the general jurisdiction of the court, under Section 145 of the Judicial Code, and not within the special jurisdiction respecting just compensation conferred by the Act of June 15, 1917, as amended by the Merchant Marine Act of 1920, 41 Statutes 989."

The answer to this is that both the attorney for the United States and the attorney for petitioner have made affidavit that the items now referred to by the court as being within its general jurisdiction, were presented and argued to the court on the hearing of the motion (Record, pages 24 and 38); but even con-

ceding that both attorneys are mistaken in this particular, then such fact could have made no difference in the ruling on the motion to dismiss, for the reason (even assuming the contracts in question to be contracts of the United States, which, as shown elsewhere in the brief, is incorrect as a matter of law) that the complaint on its face gave the United States enough credits to balance these items coming under the so-called general jurisdiction of the court. The result therefore was that petitioner, not being entitled to recover either anticipated profits or just compensation in the suit filed, could make no recovery at all, and was, under the case of McGowan vs. Columbia River Packers Assn., 245 U. S. 352, hereinbefore cited, entitled to dismiss, even had a counterclaim been already on file.

(e) It was not made to appear at the argument that the attorney representing the Government had been informed that the claim for just compensation had been "prosecuted" before the Shipping Board or that the Shipping Board had made an award thereon; also the court itself was not informed of these facts.

It is shown in the record that the Shipping Board itself, and numerous auditors and attorneys for said Board, including its chief counsel, knew of the award (Record, page 36, Vol. II.), and even if the Government's attorney who argued the motion did not know of the award, the award itself being immaterial because made long after the complaint was filed, it is immaterial whether the attorney for the Government or the court was informed concerning it.

(f) On April 30, 1923, at the time the Court made the order of dismissal, it had not information that the Shipping Board had made an award of just compensation.

This is largely a repetition of the previous point. The award itself was immaterial; therefore, it is immaterial that the court, when it ordered the dismissal did not know of the award.

Further, it is obvious that all of the details under this and the five preceding sub-heads, alleged to have been suppressed, were matters of public record either in the petition and other parts of the record in the Court of Claims, or in the files of the Shipping Board and Fleet Corporation. If any of such details could have had any bearing on the motion to dismiss, surely the attorney representing the Government had a duty at least equal with the attorney for petitioner, to make mention of such details.

General answer to all the aforegoing reasons given in the response to justify the Court of Claims order.

All the special answers we have just hereinbefore made to the various justifications set forth in the response filed herein are directed only to one point, and that is that under the circumstances of this case, petitioner would have been entitled to dismiss its case even after counter-claim had been filed. Where, as here, a plaintiff files suit upon a theory more or less justified, and afterwards it is determined by subsequent court decision that his theory is wrong and he cannot recover what he set out to recover, or as in this case, can make no recovery at all, in the suit filed, then he is entitled to dismiss even after counter-claim filed.

McGowan vs. Columbia River Packers Assn., cited at length under Point I. of this brief.

But before counter-claim a plaintiff has an absolute right to dismiss. (Point I., this brief.) Moreover, as both the original complaint and the counter-claim are based on contracts with the Fleet Corporation and not with the United States, the Court of Claims never had jurisdiction of either the complaint or the counter-claim. The only possible branch of the case which could ever come within the jurisdiction of the Court of Claims is that relating to just compensation. The contracts being contracts of the Fleet Corporation, the United States is not liable thereon. It is possible, however, that if these contracts were cancelled by the United States, then the United States might be liable for just compensation for cancelling Fleet Corporation contracts, under the Act of June 15, 1917. But to recover such just compensation, there must be a determination of the amount thereof, in accordance with the Statute, before the jurisdiction of the Court of Claims can be invoked.

Sec. 175 Judicial Code cited in response not in point.

The only other point we can find in the response in addition to those just mentioned, is that Section 175 of the Judicial Code, quoted in full on page 13 of the response, allows the Court of Claims to retain jurisdiction over all cases for two years after final disposition of such cases.

This section relates to one thing only, that is the granting of new trials and it is not apparent in what way the section is applicable to the present case, where no question of a new trial is involved.

Was Petitioner, when it filed suit against the Fleet Corporation, trying to escape the Government's counterclaim?

The court says in its response, that it seems probable that petitioner filed suit against the Fleet Corporation in Seattle to escape the counter-claim (p. 12, Response).

We have already pointed out that the United States could have filed at any time, and can now or at any time in future, file suit against petitioner in courts of general jurisdiction, so that any claim it may have can be established in such courts, there can therefore be no question of the Government losing its claim if it have one. But the Government cannot sue originally in the Court of Claims, nor can it, as is now attempted, use the Court of Claims as a court of general jurisdiction. If Congress had desired to give the Government the right to sue its citizens in the Court of Claims, it could easily have done so (provided it had made provision for a jury trial), but it has required the Government to go into other courts to maintain its suits. The only exception is that the Government may file a counter-claim against a claimant as provided in Section 145, Judicial Code.

Our filing suit against the Fleet Corporation grew out of our firm conviction that the Supreme Court of the United States has settled the proposition that under such contracts as are involved here, the Fleet Corporation is liable and the United States is not liable. In filing this suit against the Fleet Corporation, we were merely following the way this court has pointed out, and it is unfortunate that the Court of Claims should think our object was merely to escape the Government's counter-claim, an escape that is not possible

under any circumstances, for the reason that if the Government really has a claim, it has all the courts of the land (in which Congress permits it to sue) open to it.

Action of Court of Claims has created extraordinary hardship, from which petitioner is entitled to relief.

The action of the Court of Claims has placed the petitioner in a most unfortunate predicament. In order to defend against the Government's counter-claim, petitioner will be compelled, under Judicial Code, Section 154, to dismiss its suit now pending against the Fleet Corporation. Before there could be a determination in the suit in the Court of Claims, petitioner's cause of action against the Fleet Corporation would be barred by the statute of limitations. And if it should be finally held by this court, on appeal from the final judgment of the Court of Claims, that these contracts are not contracts of the United States, then petitioner would have lost its remedy, because the United States would not be liable, and the case against the Fleet Corporation would be barred. Under the ruling of the Court of Claims, petitioner is compelled to choose between allowing a judgment by default against it in the Court of Claims and allowing its cause of action against the Fleet Corporation to be barred.

We cannot use our own judgment of suing the Fleet Corporation without paying the heavy penalty of a default judgment in the Court of Claims on a counter-claim which gives no credit either for the amount due on ships which were delivered and not paid for, or for more than $3,000,000 just compensation to which the Shipping Board has determined we are entitled.

CONCLUSION

We have, we think, shown:

First: That petitioner had a right to dismiss its case in the Court of Claims;

Second: That the contracts are with the Fleet Corporation and not with the United States, and therefore not cognizable in Court of Claims;

Third: That after the Court had dismissed said case it had no power to reinstate it, being prohibited by Section 154 of the Judicial Code; and that petitioner cannot appeal either from the order allowing the counter-claim to be filed or from a final judgment in the case on account of said Section 154 of the Judicial Code, and therefore has no other remedy but the writ prayed for;

Fourth: That petitioner is not a claimant and therefore no counter-claim can be allowed against it, and the only effect of the order is to permit the Government to sue petitioner affirmatively in the Court of Claims and compel petitioner to defend against said claim while petitioner is barred from presenting its own case;

Fifth: That the whole matter has been settled by this Court in the combined Sloan, Astoria, Wood cases, and the doctrine of stare decisis should apply;

Sixth: That, in any event, the order was wrong and deprived petitioner of the right to trial by jury on the Government's affirmative case.

It is respectfully submitted that a rule absolute should be issued.

Louis Titus,
J. Barrett Carter,
Livingston B. Stedman,
George Donworth,
Attorneys for Petitioner.

COURT OF CLAIMS OF THE UNITED STATES

No. 34220

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the annexed (paged from 1 to 5, inclusive) is a true copy of the docket entries in the above-entitled cause, as the same appears of record in this Court.

[SEAL]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court at Washington City this eleventh day of April, A. D. 1924.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

DOCKET ENTRIES

34220

COLLEGE POINT BOAT CORPORATION

vs.

THE UNITED STATES

BYNUM E. HINTON,
Attorney of Record.

Nov. 1, 1919. Petition and Exhibit "A" filed. Copies of petition and notice to defendant.
(Cancellation of contract for collision mats. Navy Department.)

Nov. 3, 1919. Power of attorney filed. Defendant notified.

Nov. 18, 1919. Printed copies of petition received. Copies (10) and notice to defendant.

Jan. 2, 1920. General traverse under Rule 34 filed. Parties notified.

Jan. 20, 1920. Call on Navy Department filed. Allowed as to copies of papers mentioned and call issued Jan. 24, 1920.

Feb. 13, 1920. Reply of Navy Department filed. Parties notified.

Feb. 24, 1920. Reply of Navy Department as to paragraphs 5, 6, and 7 to call of Jan. 24, 1920, filed. Parties notified.

March 11, 1920. Reply of Navy Department as to paragraphs 4 and 8 to call of Jan. 24, 1920, filed. Parties notified.

March 22, 1920. Depositions of H. W. Schroeder, Frank E. Hodge, Horace M. Bridgewater, William H. Taubert for claimant and Exhibit marked "claimant's No. 5" filed. Parties notified.

March 25, 1920. Deposition of H. W. Schroeder with Exhibits Nos. 1, 2, 3 and 4 for claimant filed. Parties notified.

March 26, 1920. Motion for call on the Interstate Commerce Commission filed. Overruled March 27, 1920.

May 28, 1920. Certified copies (2) of papers from Interstate Commerce Commisison filed by claimant. Defendant notified.

May 28, 1920. Claimant's evidence entered closed on notice book.

Sept. 10, 1920. Defendant's evidence entered closed on notice book.

Sept. 23, 1920. Claimant's request for findings of fact and brief filed. Copies (5) and notice to defendant.

Nov. 1, 1920. Defendant's objections to plaintiff's rerequest for findings of fact; defendant's request for findings of fact and brief filed. Copies (10) and notice to claimant's attorney.

Dec. 1, 1920. Claimant's objections to defendant's objections to claimant's request for findings of fact; claimant's objections to defendant's request for certain findings of fact and reply brief filed. Copies (5) and notice to defendant.

Dec. 14, 1920. Defendant's reply brief filed in open court. Copies and notice to claimant's attorney.

Dec. 14, 1920. Mr. George A. King, as amicus curiae, given leave in open court to file a brief.

Dec. 14, 1920. Mr. C. W. Maupin (attorney for Albert and J. M. Anderson, Mfg. Co., No. 34332) granted leave in open court to file a brief on the jurisdiction of the court.

Dec. 14, 1920. Argued and submitted on merits.

Dec. 14, 1920. Brief on the question of the jurisdiction of the court filed by Mr. Maupin.

Dec. 15, 1920. Brief of Mr. George A. King, as amicus curiae, filed. Copy and notice to defendant.

Jan. 3, 1921. Court filed an order requiring that certain papers be filed.

Jan. 4, 1921. Stipulation of counsel with letter dated December 30, 1918, attached filed pursuant to order of Jan. 3, 1921.

Jan. 8, 1921. Vouchers and cancelled checks filed by defendant pursuant to order filed Jan. 3, 1921.

April 4, 1921. Court filed findings of fact and conclusion of law. Judgment for plaintiff in the sum of $20,112.42. Opinion by Judge Booth, dissenting opinion by Judge Graham.

May 27, 1921. Claimant's motion for a new trial and brief in support thereof (original and printed copies) filed. Copies (5) and notice to defendant.

May 28, 1921. Certified copy of contract in support of motion for new trial filed. Defendant notified.

June 6, 1921. Plaintiff's motion for new trial to Law Calendar.

Aug. 15, 1921. Defendant's opposition to claimant's motion for new trial with brief in support thereof filed. Copies (5) and notice to claimant's attorney.

Oct. 17, 1921. Plaintiff's motion for new trial argued and submitted.

Oct. 24, 1921. Plaintiff's motion for new trial overruled.

Dec. 19, 1921. Court filed order (on own motion) vacating and setting aside order overruling plaintiff's motion for new trial.

Jan. 11, 1922. Defendant's motion to withdraw objection to new trial filed. Copy to claimant's attorney.

Jan. 16, 1922. Court filed an order allowing new trial, vacating and setting aside former judgment and withdrawing findings and remanding case to Calendar for further proceedings.

June 28, 1922. Deposition of Harold W. Schroeder for claimant and Exhibits attached Nos. A, B, C and D filed. Parties notified.

Sept. 13, 1922. Claimant's request for findings of fact and brief filed. Copies (5) and notice to defendant.

March 21, 1923. Defendant's objections to plaintiff's request for findings of fact; defendant's request for findngs of fact and brief filed. Copies (5) and notice to defendant.

April 3, 1923. Argued and submitted on merits.

April 26, 1923. Claimant's motion to file amended petition filed. Defendant notified.

April 30, 1923. Court filed order allowing amended petition to be filed.

April 30, 1923. Amended petition filed.

May 21, 1923. Court filed findings of fact and conclusion of law; judgment for plaintiff in the sum of $5,112.42. Opinion by Judge Booth.

June 25, 1923. Claimant's application for appeal is filed. Defendant notified. Allowed June 26, 1923.

July 5, 1923. Record on appeal delivered to attorney of record.